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IN THE

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

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STATEMENT OF THE CASE

A. Background

Puerto Rico, previously a colony of Spain, became a territory of the United States under the Treaty of Paris, which was ratified in 1899 after America won the Spanish-American War. JA56. The Treaty of Paris stated that Congress would determine "[t]he civil rights and political status" of Puerto Ricans. JA62.

Exercising its constitutional power to "make all needful Rules and Regulations respecting the Territor[ies]," U.S. Const. art. IV, § 3, cl. 2, Congress has repeatedly delegated power to local Puerto Rican authorities. Congress's first delegation of power to Puerto Rico was through the Foraker Act in 1900, which established a government for Puerto Rico and allowed Puerto Ricans to elect their own House of Delegates. JA67, 79-80.

Over time, Congress granted Puerto Rico additional autonomy. In 1917, Congress passed the Jones Act, which, among other changes, created a popularly elected Puerto Rican Senate. JA107-08. In 1947, Congress enacted legislation permitting Puerto Ricans to elect their own governor, who would appoint the heads of almost every executive department in Puerto Rico. *See* Pub. L. 80-362, 61 Stat. 770 (1947). Accordingly, by 1948, Puerto Ricans were electing their own governor and both houses of their legislature.

In 1950, Congress enacted legislation authorizing the Puerto Rican people to adopt a new territorial constitution, but retaining for itself the authority to review that constitution before it became effective.

Pet. App. 353a-54a ("Public Law 600"). In accordance with Public Law 600, Puerto Rico called a convention to draft its proposed constitution, which was approved by Puerto Rican voters in March 1952. *See* H.R. Rep. 82-1832, at 1-2 (1952).

Congress approved the Puerto Rican Constitution, subject to changes. *See* Pet. App. 355a-57a. Puerto Rico's constitutional convention acceded to Congress's terms, and the Constitution became effective on July 25, 1952. *See Proclamation: Establishing the Commonwealth of Puerto Rico*, July 25, 1952, P.R. Laws Ann. Hist. § 10. The approval of the Puerto Rican Constitution, however, did not alter Puerto Rico's status as a territory under Article IV *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam).

B. Proceedings Below

Respondent Luis Sánchez Valle was indicted in Puerto Rican territorial court for, *inter alia*, selling a firearm and ammunition without a permit, *see* 25 P.R. Laws Ann. § 458. JA11-14. Based on the same incident, he subsequently pleaded guilty in federal court to illegally trafficking firearms and ammunition, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). JA21-30.

Respondent Jaime Gómez Vázquez was indicted in Puerto Rican territorial court for, *inter alia*, selling a firearm without a permit, *see* 25 P.R. Laws Ann. § 458. JA31-34. Based on the same incident, he subsequently pleaded guilty in federal court to illegally trafficking firearms, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D). JA44-55.

Following their federal guilty pleas, the territorial court dismissed all charges against Respondents on double jeopardy grounds. Pet. App. 3a-6a. The Puerto Rico Court of Appeals reversed, holding that Puerto Rico and the United States are separate sovereigns, and thus there is no double jeopardy bar to dual prosecutions. Pet. App. 268a.

As relevant here, the Puerto Rico Supreme Court reversed. In a thorough opinion, the court concluded that Puerto Rico and the United States are the same sovereign for purposes of double jeopardy because Puerto Rico is constitutionally a territory. Pet. App. 1a-69a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the result. The concurrence would have instead relied on the Puerto Rican Constitution's protection against double jeopardy. Pet. App. 71a-190a. Justice Rodríguez Rodríguez dissented. Pet. App. 191a-242a.

SUMMARY OF ARGUMENT

1. Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause. Under the Constitution, a territorial government "owes its existence wholly to the United States." *Grafton v. United States*, 206 U.S. 333, 354 (1907). Consequently, the dual-sovereignty exception "do[es] not apply." *Id.* at 355. This principle holds true even when a territory is elevated to "a commonwealth" and vested with "many of the attributes of *quasi*-sovereignty possessed by the states." *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 262 (1937). What

matters for double jeopardy purposes is the fact that such an entity, unlike a sovereign state, "'derive[s] its powers from the United States.'" *Id.* at 265.

The Court's cases drawing this conclusion reflect fundamental features of the Constitution's design. The "'residuary and inviolable sovereignty'" of the states "is reflected throughout the Constitution's text." *Printz v. United States*, 521 U.S. 898, 918-19 (1997). By contrast, the Constitution does nothing to recognize or protect the "sovereignty" of territories, which are mentioned only as subjects of Congress's plenary power. The notion of a "sovereign territory"—a polity of congressional design that nonetheless does not derive its power from Congress, and which lacks all the traditional sovereign prerogatives of states—is foreign to the Constitution.

2. Consistent with the constitutional distinction between states and territories, Congress has not conferred sovereignty on Puerto Rico. The 1950-1952 legislation authorizing Puerto Rico to adopt a constitution represented a historic but distinctly limited delegation of power. It did not oust the United States as the "ultimate source of the power" exercised by the territorial government. *United States v. Wheeler*, 435 U.S. 313, 320 (1978). Before that legislation was enacted, Puerto Rico enjoyed a "sweeping ... congressional grant of power," including the power to elect a territorial legislature that would enact criminal laws, and yet was not a separate sovereign. *Shell*, 302 U.S. at 263. An additional layer of delegation—permitting Puerto Ricans to set the parameters for the election of their officials and for the

laws they enact—cannot transform delegated federal power into power that originates or inheres in Puerto Rico.

3. Petitioner's suggestion that Public Law 600 is an unamendable super-statute—permanently abdicating Congress's power over Puerto Rico—is incompatible with basic constitutional principles and with the historical record. The same historical record also belies two key premises of Petitioner's argument that the 1950-1952 legislation established Puerto Rican sovereignty. First, Congress did not grant Puerto Ricans the unfettered authority to enact a constitution of their choosing; to the contrary, Congress struck a key provision of the constitution as originally approved by Puerto Ricans, and disabled Puerto Ricans from adopting it in the future. Second, the Puerto Rican Constitution did not free Puerto Rico from federal authority over its internal affairs. To the contrary, Congress has continued to exercise authority over many aspects of Puerto Rico's governance.

4. Although Petitioner compares itself to Indian tribes, that analogy, too, is unavailing. Indian tribes are sovereigns separate from the United States because they were originally "self-governing sovereign political communities," and they have never since "given up their full sovereignty." *Wheeler*, 435 U.S. at 322-23. Puerto Rico, by contrast, has never been a sovereign entity. Indeed, *Wheeler* expressly reaffirmed that territories, unlike Indian tribes, are *not* sovereigns. *Id.* at 321.

5. Although Petitioner insists upon its own sovereignty, it is unable to propose a rule capable of repeated application. Petitioner's indeterminate test for determining sovereignty is both troublesome as a matter of theory, and will inject uncertainty into the political status of other sub-national entities. Petitioner also refuses to reckon with the potentially sweeping implications of its position, which cast doubt on basic aspects of the legal framework governing Puerto Rico.

6. Recognizing that Puerto Rico is not sovereign does not, as Petitioner suggests, disparage the dignity of the Puerto Rican people. Rather, it pays them the respect of honestly acknowledging the present reality: Puerto Rico is a territory of the United States, and thus is not sovereign.

ARGUMENT

The Double Jeopardy Clause states that no person shall "be twice put in jeopardy" for "the same offence." U.S. Const. amend. V This Court has held that the Double Jeopardy Clause does not bar successive prosecutions for crimes with the same substantive elements, so long as those prosecutions are initiated by separate "sovereigns." *See Heath v. Alabama*, 474 U.S. 82, 87-88 (1985). This case presents the question of whether Puerto Rico is a sovereign separate from the United States.

The answer is no. As this Court has repeatedly held, under our Constitution, states are sovereign, but territories are not. Because Puerto Rico is a territory, it cannot be considered a sovereign. Petitioner

contends that Congress conferred sovereignty on Puerto Rico in 1952 when it enacted legislation approving the Puerto Rican Constitution. But a close examination of that legislation demonstrates that it constituted a delegation of power to Puerto Rico, not an establishment of sovereignty. Because the "ultimate source of the power" exercised by Puerto Rico is the United States, *Wheeler*, 435 U.S. at 320, the Puerto Rico Supreme Court's decision should be affirmed.

I. UNDER THE CONSTITUTION, STATES ARE SOVEREIGN, AND TERRITORIES ARE NOT.

A. This Court's Double Jeopardy Cases Have Unanimously Held That States Are Sovereign, and Territories Are Not.

This case begins and ends with an unbroken line of cases from this Court, dating back over a century, holding that under the Double Jeopardy Clause, states are sovereign, and territories are not.

The first of this Court's double jeopardy cases to address the constitutional distinction between states and territories was *Grafton v. United States*, 206 U.S. 333 (1907). In *Grafton*, the Court held that the Double Jeopardy Clause did not permit successive prosecutions by the United States and the Philippine Islands for the same offense. The Court rested its analysis on a basic principle of constitutional structure: Whereas "[t]he government of the United States and the governments of the several states, in the exercise of their respective powers, move on different lines," the territorial

government of the Philippines "owes its existence wholly to the United States." *Id.* at 354. "The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount." *Id.* Consequently, "the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." *Id.* at 354-55.

The Court reaffirmed this holding—and specifically extended it to Puerto Rico—in *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). The Court first observed that, through the Foraker and Jones Acts, Congress had granted Puerto Rico "full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." *Id.* at 261-62. "The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states," and to erect "the typical American governmental structure, consisting of the three independent departments." *Id.* at 262. "The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested." *Id.* By virtue of Congress's delegations, the Court explained, "[a] body politic—a commonwealth—was created." *Id.* (internal quotation marks omitted).

But despite "the sweeping character of the congressional grant of power" to Puerto Rico, the Court found it "clear" that "[b]oth the territorial and

federal laws ... are creations emanating from the same sovereignty." *Id.* at 263-64. "The situation presented," the Court reasoned, "was, in all essentials, the same as that presented" in *Grafton*. *Id.* at 265. Specifically, the essential point remained that "'[t]he government of a state does not derive its powers from the United States,'" whereas territorial governments—including Puerto Rico's—"owed their existence to the ... supreme authority" of the United States. *Id.* (quoting *Grafton*, 206 U.S. at 354). Accordingly, "legislative duplication" between territorial and federal law "gives rise to no danger of ... double punishment for the same offense," because "[p]rosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court." *Id.* at 264.[1]

This Court has adhered to *Grafton*'s understanding of the distinction between states and territories even after Congress's delegation of additional powers to Puerto Rico in the early 1950s. Indeed, the Court has relied on the proposition that territories cannot be sovereigns as a fixed point to guide other judgments about the scope of the dual-sovereignty exception. First, in *Waller v. Florida*, 397 U.S. 387 (1970), the

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[1] Petitioner relies on cases such as *In re Murphy*, 40 P. 398 (Wyo. 1895), and *State v. Norman*, 52 P. 986 (Utah 1898), for the proposition that territories have historically been viewed as separate sovereigns. Pet. Br. 23. But in *Shell*, the Court specifically stated that those cases were wrongly decided: "The Wyoming and the Utah courts thought that prosecution and punishment could be had under both statutes ... This, of course, in the light of our later decision in the *Grafton* case, is now seen to be erroneous[.]" 302 U.S. at 267.

Court concluded that municipalities are not sovereigns separate from the states of which they are a part. As the Court explained, "the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States." *Id.* at 393. "The legal consequence of that relationship," the Court said, "was settled in *Grafton*, where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." *Id.* (citation omitted).

The Court further elaborated on this distinction in *United States v. Wheeler*, 435 U.S. 313 (1978). *Wheeler* held that, for double jeopardy purposes, Indian tribes exercise sovereignty distinct from that of the United States. As part of its analysis, the Court reviewed the fundamental doctrinal distinction between states and territories. The dual-sovereignty exception, the Court said, rests "on the basic structure of our federal system, in which States and the National Government are separate political communities." *Id.* at 320. By contrast, "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *Id.* at 321 (quoting *Grafton*, 206 U.S. at 354). "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* (internal quotation marks omitted).

The Court underscored this distinction yet again in *Heath v. Alabama*, 474 U.S. 82 (1985). *Heath* explained that states are considered "separate sovereigns" under the Double Jeopardy Clause because "[t]heir powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Id.* at 89. By contrast, successive prosecutions by federal and territorial courts are barred "because such courts are 'creations emanating from the same sovereignty.'" *Id.* at 90 (quoting *Shell*, 302 U.S. at 264).

The Court has never said anything inconsistent with these repeated and unqualified statements that territories, unlike states, exercise the same sovereignty as the United States for purposes of the Double Jeopardy Clause.

B. Constitutional Structure and History Confirm that States are Sovereign, and Territories Are Not.

1. The Constitution recognizes and preserves the sovereignty of the states, but it does not authorize the creation of a sovereign territory.

Petitioner's central submission is that the unbroken line of cases recounted above must be set aside to accommodate a special status that Congress conferred on Puerto Rico in 1952. But this argument is a constitutional non-starter. The Court's precedent

distinguishing states and territories reflects fundamental attributes of the Constitution's federal structure that Congress is without power to modify.

In *Heath*, the Court explained that "sovereignty" did not carry any special meaning in the double jeopardy context; rather, the characterization of states as sovereign for double jeopardy purposes simply reflected the basic constitutional principle that states are sovereign entities. 474 U.S. at 89 ("[States'] powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."). As such, an analysis of whether territories, like states, may be considered sovereign for double jeopardy purposes requires an examination of whether the Constitution recognizes any concept of territorial sovereignty.

It does not. The Constitution sharply distinguishes between states and territories. States are "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). As "'members of the federation'" that comprises the United States, *id.* at 748-49, they "entered the Union 'with their sovereignty intact,'" *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 751 (2002). The Constitution therefore recognizes the pre-existing, "inherent" sovereignty of the states, and it preserves that sovereignty in the Tenth Amendment. *Heath*, 474 U.S. at 89.

Of course, the Constitution also authorizes Congress to admit new states. But admitting a territory as a

state vests it with the sovereignty that attends states under the Constitution. *Coyle v. Smith*, 221 U.S. 559, 566 (1911) ("The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution[.]"). Such treatment is necessary to ensure that the United States remains "a union of states[] equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567.

By contrast, the Constitution neither recognizes, nor preserves, any form of territorial sovereignty. Whereas the "'residuary and inviolable sovereignty'" of the states "is reflected throughout the Constitution's text," *Printz*, 521 U.S. at 918-19, the Constitution's sole reference to territories is that they are subject to Congress's plenary "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The natural inference is that states are sovereigns within our constitutional order, and territories are not—which is precisely what the Court has held in its long line of double jeopardy cases.

Nonetheless, Petitioner finds in the Territory Clause a hidden authorization for Congress to create two fundamentally different types of territories: sovereign territories and non-sovereign territories. This is not plausible. The framers of the Constitution were keenly sensitive to the distinction between sovereign and non-sovereign entities—a distinction that was pivotal in debates about the status of states

under the Constitution. *See, e.g.*, The Federalist No. 45, at 290 (James Madison) (C. Rossiter ed. 1961) (situating the "very extensive portion of active sovereignty" retained by the states relative to different historical paradigms); The Federalist No. 32, at 198 (Alexander Hamilton) (arguing that the states would ret in their "rights of sovereignty"). It is inconceivable that they would have lumped together sovereign entities with non-sovereign ones under the broad rubric of federal "Territory"—which is itself cast as merely a species of federal "Property," U.S. Const. art. IV, § 3, cl. 2—subject to Congress's plenary power and lacking any countervailing constitutional rights whatsoever.

The Court confirmed this point over a century ago:

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.

First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879). Thus, the Constitution recognizes states, which are sovereign, and territories, which are governed either "by" or "under the authority of" Congress. *Id.* It does not recognize the intermediate status of "sovereign territory." Petitioner emphasizes that Puerto Rico is now referred to as a "commonwealth," but "commonwealth" is not a

constitutional category lying outside of the recognized categories of states and territories.

The Founders' decision to recognize states, but not territories, as sub-national sovereigns was an important part of the constitutional plan. In our system of divided sovereignty, states occupy a unique and fundamental role. *See Alden*, 527 U.S. at 751. Contrary to Petitioner's submission, the Constitution does not authorize Congress to further subdivide the "atom of sovereignty" that the Founders "split" between the states and the federal government. *Id.* Indeed, the Court has been careful to ensure that Congress may not use its leverage over new states to adjust the constitutional division of sovereignty. *Coyle*, 221 U.S. at 566 ("[W]hat is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is ... a 'power to admit states.'"). Just as the Constitution does not permit Congress to admit 'states' that lack the rights and benefits attending that status, it provides no mechanism for Congress to create sub-national sovereigns of its own design that lack traditional states' rights.

2. The constitutional mechanisms for recognizing and preserving state sovereignty do not apply to territories.

A close examination of the Constitution's mechanisms for recognizing and preserving state sovereignty confirms that territories cannot be sovereign.

"The federal system established by our Constitution preserves the sovereign status of the States in two ways." *Alden*, 527 U.S. at 714. "First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Id.* It does this by ensuring that Congress has only enumerated powers, while the states retain a general police power. *See id.* As such, it is impossible to characterize the states' police power as a delegation of federal power. By contrast, territories, including Puerto Rico, are subject to precisely the plenary control of the federal government that the Founders eschewed with respect to states. Under the Constitution, any powers reserved to a territorial government can only be delegations of the plenary power that the Territory Clause vests in Congress; no "portion of the Nation's primary sovereignty" inheres in the territorial government itself. *See Alden*, 527 U.S. at 714.

Second, "even as to matters within the competence of the National Government," the Constitution ensured that State and Federal Governments would exercise "concurrent authority over the people," rather than permitting the federal government to "'act upon and through the States.'" *Id.* Accordingly, the Court has recognized several constitutional constraints, stemming from the Tenth Amendment, on Congress's ability to interfere with the states' exercise of their own authority. For instance, the Court has struck down statutes that commandeered state governments (*see New York v. United States*, 505 U.S. 144 (1992), and *Printz*, 521 U.S. 898) and statutes that forced state

governments into court in violation of their sovereign immunity (*see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Alden*, 527 U.S. 706). Again, as the Court has emphasized, the invalidity of those statutes reflects the fact that states are truly sovereign; Congress lacks the authority to interfere with fundamental sovereign attributes of the states, and so the ultimate authority over those attributes does not reside in Congress. And again, territories, including Puerto Rico, are different: they possess no Tenth Amendment rights, and the Constitution contains no limitation, explicit or implicit, on Congress's plenary power to make, unmake, or interfere with territorial governments.

The same analysis applies to sovereign immunity. Territories' immunity from suit arises solely from congressional will, not from any inherent sovereign status. In *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913), the Court held that Puerto Rico enjoyed a common-law immunity from suit based on congressional intent—a notion antithetical to the theory underlying state sovereign immunity. To be sure, the Court has not decided whether Congress could abrogate Puerto Rico's immunity after 1952. But *Seminole Tribe* and *Alden* were explicitly premised on the rights of states under the Constitution, and it is difficult to understand any constitutional basis for restricting Congress from exercising this power over

territories. *See Seminole Tribe*, 517 U.S. at 67; *Alden*, 527 U.S. at 713-14.[2]

3. Territories do not possess two fundamental attributes of state sovereignty: equality and a political voice.

The Constitution recognizes and preserves state sovereignty in two additional respects. It guarantees *equality* between the states, and it guarantees the states a *political voice*. Both guarantees are unavailable to territories, including Puerto Rico.

1. The Court has recognized the guarantee of equality among the states as a fundamental attribute of their sovereignty. Indeed, *Heath* identifies the states' "equal[ity] to each other" as an attribute of state sovereignty in the double jeopardy context. 474 U.S. at 89. This "fundamental principle of *equal* sovereignty among the States" means not only that the states enter the Union on an equal footing, but that they must be treated equally thereafter as well. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted). The Court has never demanded perfect equality, but it has required a strong justification for unequal treatment, and it has invalidated statutes that cannot meet this requirement. *See id.*

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[2] Whether Congress can abrogate Puerto Rico's sovereign immunity remains open in the First Circuit. *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 44 (1st Cir. 2000).

By contrast, in *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam)—a case issued long after the 1950-1952 legislation—the Court held that because Puerto Rico is a territory, Congress can treat it differently from the states for any reason that passes the highly deferential rational basis test. Thus, in *Harris*, the Court concluded that Congress could deny welfare benefits to Puerto Ricans that are available to other citizens because equal treatment would be too expensive and might "disrupt the Puerto Rican economy." *Id.* at 652. As Justice Marshall's dissent points out, these rationales are questionable. *See id.* at 655-56 (Marshall, J., dissenting). But Congress's plenary power insulates them from searching judicial review.

Puerto Rico continues to be treated differently from the states in many respects: for example, Supplemental Security Income, one of the Social Security programs, is unavailable; federal Medicaid spending is capped at a fraction of the typical federal contribution; Medicare reimbursement rates are significantly reduced; and a block grant serves as a limited substitute for the Supplemental Nutrition Assistance Program available in the states. *See* U.S. Gov't Accountability Office, GAO-14-31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 15-16 (2014). The constitutional basis of Congress's distinct treatment of Puerto Rico is that Puerto Rico is subject to Congress's plenary power and lacks the dignity of equal sovereignty.

Moreover, under current law, Puerto Rico is unequal to the states in an even more fundamental sense: Puerto Ricans are not entitled to the protection of the entire Constitution. In a series of decisions commonly known as the *Insular Cases*, the Court held that Puerto Rico was not "incorporated" into the United States. *E.g.*, *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring).[3] Thus, it held that only "fundamental" portions of the Constitution apply in Puerto Rico.[4] *Id.* at 291; *see also Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (Sixth Amendment right to jury trial does not apply in Puerto Rico).

The *Insular Cases* have been vigorously criticized over the years, *see, e.g.*, *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in the judgment), and even if they were abrogated, Respondents' position would not change: a territory of the United States, whether it is incorporated or unincorporated, is not "sovereign." But at present, the *Insular Cases* remain the law, and they are the ultimate expression of inequality between Puerto Rico and the fifty sovereign states.

2. The Court has also characterized a *political voice* as an aspect of sovereignty. The Court has thus recognized the states' various roles "in the structure of the Federal Government itself" as an important

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[3] Justice White's concurrence has long been recognized as "the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

[4] Respondents agree with Petitioner that the Double Jeopardy Clause applies in Puerto Rico. Pet. Br. 19-21.

"measure of state sovereignty." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985). For example, the Founders understood the states' powers to choose two senators apiece and to cast electoral votes as attributes of their sovereignty. *See id.* at 551-52 (noting that "Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty'" (quoting The Federalist No. 62)). Of course, a state's wish may not always prevail; but the very existence of a *say* in ultimate decisions made by the United States is a key "constitutional recognition of the portion of sovereignty remaining in the individual States." Federalist No. 62, at 378 (James Madison).

Unlike the states, the Constitution affords Puerto Rico no political voice in federal elections. Puerto Ricans cannot vote for President and, although they elect a non-voting Resident Commissioner, they lack a voting representative in either house of Congress. Puerto Rico is thus in the unique position of both lacking states' sovereign protections against congressional power, and also lacking political avenues to influence the exercise of that power. And, of course, Petitioner makes no suggestion that declaring Puerto Rico a "sovereign" for double jeopardy purposes will alter this reality.

The Constitution's conception of sovereignty is manifest in the myriad principles that account for the sovereign prerogatives of the states. These include the absence of a federal police power; the Tenth

Amendment bar on federal commandeering; true sovereign immunity; equality vis-à-vis other states; and an institutional voice in national decisions. The Founders considered *each* of these attributes vital to duly recognizing and preserving the sovereignty of the states; a territory cannot plausibly be considered sovereign under the Constitution when it possesses *none* of them.

II. THE 1950-1952 LEGISLATION DID NOT CONFER SOVEREIGNTY ON PUERTO RICO.

Notwithstanding the profound constitutional distinctions between states and territories, Petitioner contends that Congress conferred sovereignty on Puerto Rico when it enacted legislation authorizing the drafting of the Puerto Rican Constitution in 1950, and approved it with modifications in 1952. For the reasons explained above, however, the Constitution does not grant Congress the power to create such a "sovereign territory." And a review of the 1950-1952 legislation confirms that Congress acted within its constitutional powers and did not transform Puerto Rico into a sovereign. The 1950-1952 legislation constituted a delegation of power to Puerto Ricans; it did not oust the United States as the "ultimate source of the power" that was delegated. *Wheeler*, 435 U.S. at 320.

A. Because Congress Delegated The Authority To Adopt The Puerto Rico Constitution, The Power Exercised Under That Constitution Flows From Congress.

The Double Jeopardy Clause requires an analysis of "the *ultimate* source of the power under which the respective prosecutions were undertaken." *Id.* (emphasis added). Even though the 1950-1952 legislation represented a substantial delegation of power to Puerto Rico, it did not change the fact that the ultimate source of Puerto Rico's power to prosecute local crimes is the federal government.

Petitioner apparently concedes—as it must, in light of *Shell*—that prior to the 1950-1952 legislation, Puerto Rico was not sovereign. Yet at the time of *Shell*, Congress had already delegated to Puerto Ricans the power to elect a legislature that would enact territorial laws. Indeed, Congress had granted Puerto Rico "full power of local self-determination," and had conferred "many of the attributes of *quasi*-sovereignty possessed by the states." 302 U.S. at 261-62. Nonetheless, this Court held that the Puerto Rican government was not sovereign because it "owed [its] existence" to the United States. *Id.* at 265. *Accord Heath*, 474 U.S. at 90 (reaffirming *Shell*'s double jeopardy reasoning); *Wheeler*, 435 U.S. at 318, 319 n.13 (same); *Waller*, 397 U.S. at 393 (same).

The 1950-1952 legislation did not alter that reality. In 1950, Congress enacted new legislation that delegated authority to the Puerto Rican people to draft a constitution, which would in turn provide for the

election of government officials, who would in turn govern the territory. But this additional layer of delegation—*i.e.*, the grant of authority to adopt a constitution—is still a delegation, and the source of the delegated authority is still the federal government.

Petitioner notes that many territories adopted constitutions when they were admitted to the Union as sovereign states. Pet. Br. 44. But as explained above, when states are admitted to the Union, they do not become sovereign by virtue of their state constitutions; they become sovereign because they acquire the protections and attributes of sovereignty that the Federal Constitution affords to "states." By contrast, Puerto Rico enjoys no such constitutional status. Thus, Petitioner is left to argue that, lacking such recognition under the Federal Constitution, the Puerto Rican Constitution in and of itself is sufficient to confer sovereignty. This is simply wrong. There is no principled reason why *one* layer of delegation—to elect a territorial legislature to enact laws—does not confer sovereignty, but *two* layers of delegation—to enact a constitution that authorizes a territorial legislature to enact laws—yields a sovereign entity.

The appropriate analogy for the Puerto Rican Constitution is not a state constitution, but a municipal charter. In *Waller*, the Court stated that "the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States," 397 U.S. at 393, and the analogy is particularly apt in the context of the Puerto Rican Constitution. Many states have adopted "home rule"

provisions that authorize municipal governments to adopt or amend local charters. *See, e.g.*, Cal. Const. art. XI, §§ 5, 7; Colo. Const. art. XX, § 6; Ohio Const. art. XVIII, §§ 3, 7. Under those delegations, the people set the terms of their own governance and, in turn, elect mayors, city councilors, and municipal judges, who operate without interference by state governments. *See* David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2290 (2003) ("After home rule, many local governments, particularly large ones, could adopt charters that set forth their own powers and enabled them to appoint their own officers.").

The adoption of a municipal charter thus has the same effect as the adoption of the Puerto Rico Constitution: "to invest the governing authorities of the municipality—either a majority of the voters, or such officers as are prescribed—with the power of local government over the inhabitants of that district." 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.2, Westlaw (3d ed., database updated July 2015). Because the authority to enact those charters derives from the states, however, the municipalities are not separate sovereigns. *Wheeler*, 435 U.S. at 319; McQuillin, *supra*, at § 9.9. Likewise, because the authority to enact the Puerto Rican Constitution derives from Congress, Puerto Rico is not sovereign.

The post-1952 case law addressing Puerto Rico cited by Petitioner does not support a contrary conclusion. Petitioner relies on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), as confirmation that Puerto

Rico is a separate sovereign. Pet. Br. 35-37. But those cases hold only that—as a matter of statutory interpretation—the word "state" encompasses Puerto Rico in certain circumstances. *See Calero-Toledo*, 416 U.S. at 675; *Flores de Otero*, 426 U.S. at 594-95. In other circumstances, however, the Court has made clear that the word "State" does not encompass Puerto Rico. *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (explaining that "a Puerto Rican statute is not a 'State statute' within [the meaning of 28 U.S.C.] s 1254(2)"). Thus, whether Puerto Rico may be considered a "State" for purposes of a federal statute depends on the statutory context. These cases do not establish Puerto Rico's sovereignty.

Petitioner further cites *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982). Pet. Br. 37. But there, the Court simply upheld a particular mechanism for filling legislative vacancies against a constitutional challenge. Although the Court used the word "sovereign" in passing, 457 U.S. at 8, at no point did it purport to overrule its repeated and unqualified statements that territories are not separate sovereigns.

At most, these cases hold that Puerto Rico shares many attributes in common with the states, even though it is not, in fact, a state. We do not dispute this point. It is fully consonant with our position that Puerto Rico shares many attributes in common with sovereigns, but is not, in fact, sovereign.

B. Congress's Ability To Amend or Repeal The 1950-1952 Legislation Confirms That The Federal Government Remains The Ultimate Source Of Puerto Rico's Power.

Further underscoring the fact that the 1950 and 1952 enactments did not confer sovereignty is that those enactments are ordinary acts of Congress, which can be amended or repealed. As we have noted, the Tenth Amendment guards against undue interference with the operations of state governments. *Supra* at 16-17. But the Constitution imposes no such limitations on congressional power over territorial governments. Congress may therefore amend or repeal its 1950-1952 legislation at any time. If Congress forbears from doing so, that is simply a discretionary decision that does not alter its ultimate power over Puerto Rico.

Congress's power to amend or repeal its 1950-1952 legislation derives from a basic constitutional principle: one Congress cannot bind a subsequent Congress. *See Fletcher v. Peck*, 10 U.S. 87, 138-39 (1810). Applying that principle, the Court has specifically held that delegations of power from one Congress to a territory are subject to revocation by a subsequent Congress. *United States v. Sharpnack*, 355 U.S. 286, 296 (1958); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 106, 109 (1953). Significantly, for decades, the Executive Branch has taken the identical view: the 1950 and 1952 statutes are Acts of Congress which may be amended. *See* Report by the President's Task Force on Puerto Rico's Status 26 (Mar.,2011); Report by the

President's Task Force on Puerto Rico's Status 5-6 & apps. E-G (Dec. 2007).[5]

Petitioner resists this proposition, contending that the 1950-1952 legislation is immune from amendment. But Petitioner confines its legal argument to a footnote, Pet. Br. 42 n.5, and the authorities cited in that footnote are entirely inapposite. For instance, Petitioner cites case law establishing that the United States can enter into binding government contracts, such as savings bonds. *See Perry v. United States*, 294 U.S. 330, 353 (1935). But the 1950-1952 legislation is not a savings bond; it is an exercise of sovereign power which cannot be contracted away. *See Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879). Petitioner also offers the example of legislation conferring independence on the Philippines. But Congress *could* repeal that legislation; it would simply have no practical effect because, unlike Puerto Rico, Congress explicitly approved the relinquishment of *United States* sovereignty over the Philippines, and the American flag no longer flies over the Philippines. Finally, Petitioner cites *Downes v. Bidwell* for the proposition that fundamental provisions of the Bill of Rights apply in Puerto Rico; yet Petitioner advances no

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[5] An OLC opinion from 1963 states that Congress could constitutionally enact a "pending proposal" to enter into a binding compact with Puerto Rico, although it does not address the legal consequences of the 1950-1952 legislation. *See* Memorandum, Power of the United States to conclude with the Commonwealth of Puerto Rico a compact which could be modified only by mutual consent (July 23, 1963), http://www.justice.gov/olc/file/796061/download. That opinion was issued before *Waller* and *Wheeler*, however, and the Executive Branch no longer adheres to the views within.

argument that amending or repealing the 1950-1952 legislation would violate the Bill of Rights. Petitioner identifies no remotely analogous context in which a statute was held immune from amendment or repeal.

Petitioner also relies on statutory language characterizing Public Law 600, which authorized the constitutional convention, as being "in the nature of a compact." Pet. App. 353a; *see* Pet. Br. 42 n.5. But Congress described the legislation this way because unlike a typical Act of Congress, Public Law 600 would be inoperative until it was "submitted to the qualified voters of Puerto Rico for acceptance or rejection." Pet. App. 353a; *see* S. Rep. 81-1779, at 2 (1950) ("The measure is in the nature of a compact, with specific provision made for an island-wide referendum in which the Puerto Ricans will be free to express their will for acceptance or rejection of the proposal."). The point was that Congress would not unilaterally foist the constitution-making process on the Puerto Rican people if they did not want it (and, as the referendum revealed, many nationalists did not); rather, the process would continue only if there was a mutual agreement to proceed. *See Puerto Rico Constitution: Hearing Before a Subcomm. of the S. Comm. on Interior and Insular Affairs on S. 3336*, 81st Cong. 4 (May 17, 1950) (statement of Resident Commissioner Antonio Fernós-Isern) (explaining that "Puerto Rico is called upon to express its approval and consent to such conditions [i.e., those in the bill]," and "[t]hat is why S. 3336 would have the nature of a compact"). But Congress's desire to cooperate with the Puerto Rican people in 1950 does not establish an intent to prevent future Congresses

from exercising their own judgment on Puerto Rico's political status.

The legislative history confirms that Congress did not intend to enact legislation that would be immune from amendment or repeal. The House and Senate Reports stated that Public Law 600 "in no way precludes future determination by future Congresses of the political status of Puerto Rico." S. Rep. 81-1779, at 4; *see* H.R. Rep. 81-2275, at 3 (1950). At the 1952 Senate hearings, Chairman O'Mahoney reiterated the "fundamental" view "that the Constitution of the United States gives the Congress complete control and nothing in the Puerto Rican constitution could affect or amend or alter that right." *Approving Puerto Rican Constitution: Hearings Before the S. Comm. on Interior and Insular Affairs on S.J. Res. 151*, 82d Cong. 40 (May 6, 1952). The Chief Counsel for the Interior Department's Office of Territories, too, reassured concerned senators that the new legislation could not disturb "the basic power inherent in the Congress of the United States ... to annul any law in any of our Territories." *Id.* at 43-44 (statement of Irwin Silverman). And Members of the House likewise understood that in accepting the Puerto Rico Constitution, Congress would not "in any way make an irrevocable delegation of its constitutional authority." 98 Cong. Rec. 6170 (1952) (statement of Rep. Meader).

In any event, if the existence of magic words in legislation could make it immune from repeal, the principle that a Congress cannot bind future Congresses would be rendered meaningless. Indeed, given that a treaty with an *actual* sovereign, enacted

under the constitutionally-recognized process of Article II, § 2, can always be repealed by an Act of Congress, *Breard v. Greene*, 523 U.S. 371, 376 (1998), it is difficult to understand how merely uttering the word "compact" in legislation related to a federal *territory* could immunize such legislation from repeal.

Yet there is no need to speculate regarding Congress's ability to amend the 1950-1952 legislation; one can just look to history. Public Law 600 states that, except for certain provisions that were repealed, the Jones Act would "continue[] in force and effect" and thereafter be known as the "Puerto Rican Federal Relations Act." Pet. App. 354a. Over the years, however, Congress has amended various provisions of the Federal Relations Act without seeking Puerto Rico's consent. *See, e.g.*, Pub. L. 89-571, 80 Stat. 764 (1966) (providing life tenure for judges); Pub. L. 91-272, § 13, 84 Stat. 294, 298 (1970) (altering diversity jurisdiction). These changes sit uncomfortably with Petitioner's portrayal of Public Law 600 as a statute requiring Puerto Rico's consent to be altered.

The most practically consequential breach of the purported compact, however, relates to a different provision of the Jones Act, which, under Public Law 600, "continued in force and effect": Section 9. That section directed "all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed on the island ... into the treasury of Porto Rico." JA98. The practical effect of Section 9 was to direct all excise taxes on Puerto Rican rum, a major Puerto Rican export, to the Puerto Rican treasury.

Puerto Rico has received billions of dollars in rum excise taxes, and that revenue is critical to Puerto Rico's financial health. *See* Steven Maguire & Jennifer Teefy, Cong. Research Serv., R41028, *The Rum Excise Tax Cover-Over* 4 (2010).

Of all the provisions in Public Law 600 and the Federal Relations Act, Section 9 is the only one in which Congress committed to direct funds to Puerto Rico; as such, its subsequent history serves as an excellent test of whether Congress viewed Public Law 600 as a binding commitment. And Congress did not. In 1984, Congress decided no longer to adhere to its obligation under the Federal Relations Act to remit "all taxes" to Puerto Rico by capping the amount remitted at $10.50 per gallon. 26 U.S.C. § 7652(f)(1). Congress has prospectively eliminated this cap on a year-by-year basis in a series of appropriation bills dating back to 1999, but as of this writing, the cap is back in force. *Id.* Puerto Rico's entitlement to rights conferred in Public Law 600—the very enactment that authorized Puerto Rico to adopt its constitution—is thus at the mercy of the congressional appropriations process. Congress's power to modify the 1950-1952 legislation as it sees fit—both in theory and in practice—confirms that the ultimate source of power in Puerto Rico remains the federal government.

C. The Provisions Of The Puerto Rico Constitution Cited By Petitioner Do Not Establish Puerto Rico's Sovereignty.

Contrary to Petitioner's contention, no language in the Puerto Rican Constitution establishes Puerto

Rico's sovereignty. Petitioner contends that the use of language such as "[w]e, the people" establishes that Puerto Rico's authority derives from the Puerto Rican people. Pet. Br. 29 (quoting P.R. Const. pmbl.). But a reference to "the people" cannot by itself establish sovereignty, as evidenced by the fact that both the Foraker and Jones Act similarly stated that criminal prosecutions would be initiated in the name of the "people of P[uer]to Rico," JA75, 98-99. Petitioner characterizes the Puerto Rico Constitution's language as "redolent" of the U.S. Constitution, Pet. Br. 29, but the United States is sovereign because it won the Revolutionary War, not because its Constitution says "we the people." Indeed, similar language appears in innumerable municipal charters across the country. *See, e.g.*, Pensacola, Fla., Charter, pmbl. ("We the people of the City of Pensacola ... in order to secure the benefits of local self-government ... do hereby adopt this charter and confer upon the City the following powers ... ."); Whitefish, Mont., Charter, pmbl. ("We, the people of the city of Whitefish, Montana ... in order to ... provide for local self-determination, do hereby adopt this charter."); Placentia, Ca., Charter, pmbl. ("We, the people of the City of Placentia ... do ordain and establish this Charter as the organic law of said City ... "). Those terms may accurately reflect the democratic processes through which the municipal charters were adopted, but they do not change the fact that ultimate authority lies with the states, which conferred the power to adopt those charters. The same is true of Puerto Rico.

Petitioner further emphasizes that the Puerto Rico Constitution creates the legislative, judicial, and executive branches of the territorial government. Pet. Br. 30; *id.* at 32 (relying on Puerto Rico's "republican form of government"). Again, however, municipal charters often similarly authorize a mayor, city councilors, and municipal judges. The people of Denver, for example, elect their own mayor and city council members; the mayor appoints judges to the County Court; and the County Court has jurisdiction over all cases arising under Denver's charter or ordinances. Denver, Colo., Code of Ordinances, tit. I, subtit. B, §§ 4.1.4, 4.2.6. Yet the existence of the Denver charter does not establish Denver's sovereignty.

Moreover, the tripartite government established in the Puerto Rican Constitution is closely similar to the government that pre-dated that constitution. For example, the Constitution sets forth ground rules for the election of a governor and members of the Puerto Rican legislature, but these closely resemble the procedures already established by Congress in the Jones Act, as amended by the Elective Governor Act, Pub. L. 80-362, 61 Stat. 770 (1947). Existing law provided for gubernatorial elections every four years, with a residency requirement and a minimum age of thirty; the Constitution lengthened the residency requirement and increased the minimum age to thirty-five. *Compare id.* § 1, 61 Stat. 770-71, *with* P.R. Const. art. IV, §§ 1-3. Existing law provided for seven Senate districts and thirty-five House districts; the Constitution provided for eight and forty, respectively.

Compare Jones Act § 28 (JA109), *with* P.R. Const. art. III, § 3. The enactment of the Puerto Rican Constitution codifying a government with substantial similarities to the pre-existing government structure is not a conferral of sovereignty.[6]

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[6] Petitioner suggests in passing that it may be unconstitutional for Congress to delegate federal power to Puerto Rican officials without retaining direct control over their activities, and contends that those Puerto Rican officials must therefore be exercising sovereign power. Pet. Br. 30. That argument lacks merit. Congress's broad power under Article IV to "make all needful Rules and Regulations respecting the Territor[ies]" encompasses the power to delegate authority to territorial officials who do not operate under the federal government's direct supervision. Indeed, Congress has done just that in other territories that Petitioner concedes are not sovereign. For instance, Guam and the Virgin Islands elect their governors and operate their own territorial criminal justice systems without meaningful federal supervision, 48 U.S.C. §§ 1422, 1591, yet Petitioner acknowledges that those are not sovereign entities. Pet. Br. 38-39 n.4. The mayor of D.C. is neither appointed nor supervised by the President, yet Petitioner concedes that D.C. is not sovereign. *Id.* Moreover, even before the 1950-1952 legislation, Puerto Rico elected its governor and both branches of its territorial legislature, yet Petitioner acknowledges that Puerto Rico was not sovereign at that time and identifies no constitutional problem with that regime. Indeed, in *Shell*, decided only two years after the Court invalidated federal regulations under the non-delegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court acknowledged that Congress had granted quasi-sovereign powers to the Puerto Rican legislature, but no member of the Court suggested that this might pose a non-delegation problem. We are aware of no authority holding that the creation of territorial governments might violate the Appointments Clause or other separation-of-powers doctrines.

Petitioner notes that Puerto Rican laws are no longer subject to congressional veto. Pet. Br. 30. Given the plenary power Congress still holds over Puerto Rico, however, it could preempt any Puerto Rican legislation at any time. Thus, Congress has not given up any power it previously held. Further, in the 52 years during which the Foraker and Jones Acts were in force, there are no recorded cases of Congress annulling a law enacted by the Puerto Rican legislature, despite its statutory power to do so. In both theoretical and practical terms, then, Puerto Rico's legislature exercised an identical degree of power before the adoption of its constitution as it does now. We do not dispute the symbolic significance of the removal of the congressional veto, but it does not show that Puerto Rico is now sovereign.

D. Contemporaneous Evidence Confirms That The 1950-1952 Legislation Did Not Confer Sovereignty On Puerto Rico.

Petitioner contends that Respondents' position would "'impute to the Congress the perpetration of ... a monumental hoax.'" Pet. Br. 2 (quoting *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956)). To the contrary, the legislative history of the 1950-1952 legislation, and the contemporaneous statements of political leaders, reveal a consensus that the enactments would not alter Puerto Rico's fundamental political status.

The House and Senate Committee Reports on Public Law 600 both stated that the law "would not change Puerto Rico's fundamental political, social, and

economic relationship to the United States." H.R. Rep. 81-2275, at 3; S. Rep. 81-1779, at 3. They also made clear that the law in no way "preclude[s] a future determination by the Congress of Puerto Rico's ultimate political status." H.R. Rep. 81-2275, at 3; S. Rep. 81-1779, at 4; *see also* H.R. Rep. 81-2275, at 4 (stating that the law "would be a fundamental contribution to the art and practice of the government and administration of Territories *under the sovereignty of the United States*" (emphasis added)). The Secretary of the Interior, the cabinet officer responsible for the administration of Puerto Rico, similarly explained that the law would "not change Puerto Rico's political, social, and economic relationship to the United States." H.R. Rep. 81-2275, at 5.

Puerto Rico's elected representatives shared that understanding. Puerto Rico's non-voting delegate to Congress testified that the legislation "would not change the status of the island of Puerto Rico relative to the United States... It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris." *Hearing Before a Subcomm. of the Comm. on Interior and Insular Affairs*, 81st Cong. 4 (May 17, 1950) (statement of Hon. Antonio Fernós-Isern).

The popularly elected governor of Puerto Rico, Luis Muñoz Marín, likewise confirmed that "Congress [could] always get around and legislate again" if Puerto Rico did not fare well under its own constitution. *Puerto Rico Constitution: Hearings Before the Comm.*

on Public Lands on H.R. 7674 and S. 3336, 81st Cong. 33 (Mar. 14, 1950).[7]

There is simply no evidence that anyone in 1952 thought that Puerto Rico had become America's first sovereign territory. The Court should refrain from issuing a declaration that departs so dramatically from the consensus of the elected officials involved in the decision at issue.

E. The Factual Predicates of Petitioner's Argument Are Historically Inaccurate.

Thus far we have assumed the truth of the two key factual premises of Petitioner's argument: that the Puerto Rican people enacted "their own Constitution," and that under that Constitution, the federal government does not "interfere with the Commonwealth's internal governance." Pet. Br. 29-30. We have argued that these premises, even if true, do not establish Puerto Rico's sovereignty.

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[7] Petitioner cites the United States' letter to the United Nations as evidence of Puerto Rico's sovereignty. Pet. Br. 37. Yet that letter does not characterize Puerto Rico as a sovereign; it states that Puerto Rico presently is a self-governing entity, a statement entirely consistent with the position that the power to exercise such self-government is delegated by the United States. Indeed, for decades, the Executive Branch has simultaneously held the position that Puerto Rico is self-governing, and that the legislation delegating Puerto Rico the power to exercise such self-government can be amended by Congress. *See supra* 27-28. In any event, a letter from the State Department to the U.N. sheds little light on whether the Constitution permits the creation of a sovereign territory.

In fact, however, both of those premises are false. First, the Puerto Rican Constitution cannot genuinely be characterized as Puerto Ricans' "*own* constitution," as the version of the constitution adopted by Puerto Ricans was substantially amended by Congress. Further, even under that Constitution, the federal government continues to interfere with Puerto Rico's internal governance. These two facts provide additional confirmation that the 1950-1952 legislation did not confer sovereignty on Puerto Rico.

1. Congress's changes to the constitution approved by the Puerto Rican people confirm that Puerto Rico is not sovereign.

Petitioner's assertion that Puerto Ricans "enacted and approved their own Constitution," Pet. Br. 29, is an incomplete description of the events of 1950-1952. In fact, Congress barred Puerto Rico from enacting a constitutional provision that its people had approved—an exercise of federal control that would have been plainly unconstitutional with respect to the states.

In *Coyle v. Smith*, 221 U.S. 559 (1911), this Court explained the limits of Congress's control over a new state that enters the Union. In short, Congress may impose entrance conditions of its choosing, but once a state joins the Union, Congress cannot constrain the state's exercise of its sovereign powers without an independent constitutional basis for doing so. *See id.* at 568. Put another way, Congress cannot use its leverage over new states to impose enduring restrictions that it could not have imposed on existing states. Applying

that principle, the Court invalidated a statute that barred Oklahoma from moving its capital after it joined the Union. *Id.* at 574.

The *Coyle* doctrine does not apply to territories, however, and Congress may therefore demand permanent changes to a territorial constitution that would be unconstitutional infringements on state sovereignty. The events giving rise to the Puerto Rico Constitution illustrate this point.

The Puerto Rican people approved their draft constitution by referendum in March 1952. *See* H.R. Rep. 82-1832, at 3-5. Although much of the proposed constitution was similar to the constitutions of the states, *see* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 114 (1997), the proposed constitution broke new ground in one significant respect. Section 20 of the Bill of Rights, modeled on the Universal Declaration of Human Rights, recognized a panoply of "human rights." *See infra* App'x.[8] These included rights "to obtain work," "to food, clothing, housing and medical care and necessary social services," to "social protection in the event of unemployment, sickness, old age or disability," and to "special care and assistance" for "motherhood and childhood." *Id.* Section 20 further committed the government to "assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation," and directed that all relevant laws be construed so as to further these aims. *Id.*

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[8] The full text of Section 20 is in an appendix to this brief.

After the constitution was approved by the Puerto Rican people, it was transmitted to the President and to Congress for their review. Numerous members of Congress expressed disagreement with Section 20, *see* 98 Cong. Rec. 6171-75, 7847 (1952), and Congress ultimately opted to cut Section 20 from the approved version of the constitution. Pet. App. 356a. In addition, recognizing that the Puerto Rican people would likely re-enact the provision if they could, *see* 98 Cong. Rec. at 7844, Congress also required them to enact a separate constitutional amendment barring themselves from reintroducing Section 20 later through the constitutional amendment process. Specifically, this mandatory amendment prohibited Puerto Rico from ever adopting any amendment inconsistent with Congress's original resolution of approval (which disapproved Section 20), or with Public Law 600 or the Federal Relations Act.[9] Congress also required Puerto Rico to amend its Constitution with pre-approved language that affirmed students' freedom to choose private elementary schools. Pet. App. 356a.

Petitioner asserts that Congress required its amendments to be approved "by the people of Puerto Rico," Pet. Br. 35, but that is incorrect. Under the resolution approving the Puerto Rican Constitution, the constitution's original provisions regarding public education and the amendment process would "have no force and effect" until the people of Puerto Rico used

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[9] Puerto Rico could not amend its Constitution to remove this provision; any such amendment would be preempted by the same 1952 resolution. In any event, Puerto Rico has never tried.

their new constitutional amendment procedures, including a popular referendum, to incorporate Congress's chosen language. Pet. App. 356a. As such, the Puerto Rican people ultimately voted on, and ratified, those two changes—albeit as conditions of rendering their new constitution fully operative. *See Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico*, Jan. 29, 1953, P.R. Laws Ann. Hist. § 11. By contrast, Puerto Ricans never had any opportunity to vote on the deletion of Section 20, which Congress simply refused to approve. Pet. App. 356a.

Petitioner attempts to explain this history away by describing the deletion of Section 20 as a "minor" change. Pet. Br. 18. But the decision of whether to constitutionalize a catalog of positive rights—and to direct the judiciary to adopt a sweeping rule of construction favoring them—is not a "minor" point. *Cf. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (explaining that "[t]he Framers were content to leave the extent of governmental obligation" with respect to such rights "to the democratic political processes"). Certainly Congress did not view it that way at the time. To the contrary, Congress made a significant and unilateral change to the Constitution adopted by the Puerto Rican people based on its policy disagreement with that document. We do not mean to denigrate the historic process underlying the drafting of the Puerto Rican Constitution, of which many Puerto Ricans are rightfully proud. But the fact that the Puerto Rican Constitution was unilaterally revised by Congress to

remove Section 20, and then put into effect without after-the-fact ratification by the Puerto Rican people, is irreconcilable with Petitioner's suggestion that the Puerto Rican Constitution established Puerto Rico's sovereignty.

Significantly, if Puerto Rico had been a state, the changes to its Constitution would have been unconstitutional under *Coyle*. Although this Court's cases have on some occasions endorsed an expansive vision of federal power, it is difficult to imagine the Court upholding federal legislation preempting the enactment of a right to education or healthcare in state constitutions. Thus, Congress's freedom to impose such a restriction on Puerto Rico reflects the absence of Puerto Rican sovereignty.

Petitioner relies on the fact that Congress has sometimes imposed conditions on states seeking to enter the Union. But it misunderstands the legal significance of those conditions. As the Court made clear in *Coyle*, Congress is perfectly free to condition the entry of a state on its making changes to its constitution; but it cannot regulate what the state does with its constitution after it becomes a state, unless such regulation falls within Congress's enumerated powers. Arizona, one of Petitioner's examples, Pet. Br. 34-35, illustrates this point perfectly. When Arizona sought to enter the Union, its proposed constitution authorized citizens to recall any public official, including judges. President Taft insisted that Arizona's admission be conditioned on its adopting an amendment to exclude judges from the recall provision. H.R. Doc. No. 62-106, at 9 (Aug. 15, 1911). Taft conceded,

however, that because "the people of Arizona are to become an independent State," they would inevitably be free to "reincorporate [the provision] in their constitution after statehood." *Id.* Congress imposed the requested condition; the people of Arizona obliged by adopting the necessary amendment; and Arizona was admitted as a state on February 14, 1912. *See* Proclamation, 37 Stat. 1728 (1912). As expected, the Arizona Legislature promptly proposed an amendment that would restore the original recall provision. The people of Arizona adopted that amendment in November 1912, and it remains in force today. *See* Ariz. Const. art. 8, pt. 1, § 1. There was nothing the federal government could do: as *Coyle* makes clear, once a state attains sovereignty, Congress's leverage ends.[10]

By contrast, federal law prohibits Puerto Rico from ever making a change to its Constitution inconsistent with the 1952 legislation, and Congress forced Puerto Rico to amend its Constitution to achieve the same result. It is this continuing exercise of power over Puerto Rico that distinguishes it from the states and confirms that it is not sovereign.

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[10] Petitioner also asserts that "Congress required the adoption" of an amendment when it approved the New Mexico constitution in 1911. Pet. Br. 35. That is wrong. In the statute cited by Petitioner, Congress required New Mexico to put a new Article XIX *to a vote*, but explicitly stated that if the vote failed, "Article XIX of the constitution of New Mexico as adopted [previously] shall remain a part of said constitution." 37 Stat. 39, 42 (1911). New Mexico did ultimately adopt the new Article XIX, but substantially revised it in 1996. *See Governing New Mexico* 40-41 (F.C. Garcia et al. eds., 2006).

2. Congress's post-1952 limitations on Puerto Rican self-government demonstrate that Puerto Rico is not sovereign.

The federal government's post-1952 limitations on Puerto Rican self-government went well beyond the permanent bar on re-enacting Section 20. Even after 1952, the federal government has continued to exercise authority over Puerto Rico's government in numerous respects, each of which would have been unconstitutional if applied to a state.

For instance, Public Law 600 left intact restrictions on Puerto Rico's ability to exercise the basic sovereign powers of imposing taxes and borrowing money. In particular, Public Law 600 left in force Section 3 of the Jones Act, which included a provision—still in force today—banning Puerto Rico from taxing its own municipal bonds. Pet. App. 354a; Pub. L. 75-391, 50 Stat. 843, 844 (1937). It also left in force a different portion of Section 3, which limited Puerto Rico's ability to issue sovereign debt. *See* 50 Stat. at 844 (providing that Puerto Rico and certain of its municipalities could not take on debt exceeding 10% of their property value, and other municipalities could not take on debt exceeding 5% of their property value). Congress ultimately repealed that provision in 1961, but only on the condition that Puerto Rico amend its own Constitution to limit its debt. Pub. L. 87-121, 75 Stat. 245 (1961). These restrictions on fundamental powers like taxing and borrowing—which have no analog in any state—belie Petitioner's assertions that Puerto Rico's Constitution established its sovereignty.

The 1950-1952 legislation also preserved federal control over Puerto Rico's judiciary exceeding such control in any state. For instance, Public Law 600 preserved Section 10 of the Jones Act, which provides that "all judicial process shall run in the name of 'United States of America, ss [*scilicet*], the President of the United States,'" a provision that survives today. Pet. App. 354a; JA98-99; 48 U.S.C. § 874. Moreover, even after 1952, criminal defendants had the right to appeal federal issues from the Puerto Rico Supreme Court to the First Circuit, and in civil cases, the First Circuit had jurisdiction to review the Puerto Rico Supreme Court's application of territorial law. *See Figueroa*, 232 F.2d at 618. By contrast, state courts have the final say on issues of state law, and only the Supreme Court can reverse their judgments on issues of federal law. Although Congress repealed these provisions several years later, the subordination of the Puerto Rico Supreme Court to the First Circuit is inconsistent with Petitioner's view that the 1950-1952 legislation conferred sovereignty on Puerto Rico.

Nor has the adoption of Puerto Rico's Constitution inhibited Congress from enacting new legislation that would be unconstitutional as applied to the states. For instance, after this Court held that Congress could not require state governments to grant religious exemptions under the Religious Freedom Restoration Act, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress enacted a new version of RFRA that explicitly applied this requirement to Puerto Rico and other federal territories. *See* 42 U.S.C. § 2000bb-2(2).

These enduring mechanisms of federal oversight refute Petitioner's contention that the 1950-1952 legislation conferred sovereignty on Puerto Rico, or even that it sought to do so. To be sure, in many respects, Puerto Rico is treated similarly to states today. But Puerto Rico is not like a state in all respects, and it is those differences—where Congress chooses to legislate in Puerto Rico in a manner that would be unconstitutional as applied to the states—that establish that the federal government remains the ultimate source of the power delegated to Puerto Rico.

III. PUERTO RICO IS NOT COMPARABLE TO INDIAN TRIBES.

Recognizing the fundamental differences between states and territories under the Constitution, Petitioner attempts to analogize Puerto Rico to Indian tribes, Pet. Br. 40-43, which this Court has characterized as separate sovereigns for double jeopardy purposes. Petitioner's analogy is without merit.

Indian tribes are not "territories" under the Constitution. To the contrary, the Constitution characterizes Indian tribes as distinct political entities analogous to foreign nations and states, *see* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes"), and excludes "Indians not taxed" from the American polity for apportionment purposes. *Id.* § 2, cl. 3.

The unique constitutional status of Indian tribes was the basis for this Court's decision in *Wheeler*,

which established that Indians are separate sovereigns for double jeopardy purposes. As the Court explained, "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." 435 U.S. at 322-23. Tribes have been divested of "some aspects of the sovereignty which they had previously exercised," but "the Indian tribes have not given up their full sovereignty." *Id.* at 323. Thus, the theory behind *Wheeler* was that the tribes *already had* sovereignty when the Union was founded, and that a portion of that sovereignty still remains.

This argument does not apply to Puerto Rico. Puerto Rico was not a sovereign entity that predated the Constitution; to the contrary, prior to the United States' acquisition of Puerto Rico, it was a colony subject to the complete power of the Spanish king and Cortes (Spain's equivalent of Congress). *See* Trías Monge, *supra*, at 9-13. Because Puerto Rico has always been subject to the plenary authority of another nation, there is no inherent or retained Puerto Rican sovereignty that Congress could recognize and preserve.

Confirming the point, *Wheeler*—which post-dated the Puerto Rican Constitution by over 25 years—made clear that territories, unlike tribes, are *not* sovereign for double jeopardy purposes. The Court stated: "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State," but as "'an agency of the federal government.'" 435 U.S. at 321. Thus, "Territory and Nation ... are not two separate sovereigns ... but one alone." *Id.* This is

because "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *Id.* (quoting *Grafton*, 206 U.S. at 354). Tribes, by contrast, are separate sovereigns because they originated before the federal government and "retain their existing sovereign powers." *Id.* at 323. Petitioner cites *Wheeler* eight times in its brief—but never once acknowledges *Wheeler*'s repeated rejection of the exact argument that Petitioner now advances.[11]

Moreover, *Wheeler* explicitly rejected the argument that drafting a constitution could create sovereignty. The Court stated that Congress had enacted statutes that had "authorized the Tribe to adopt a constitution for self-government," yet "none of these laws *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders." *Id.* at 327-28. Rather, the Indians "already had such power under existing law." *Id.* at 328 (internal quotation marks omitted). This refutes Petitioner's argument that Congress's authorization of a Puerto Rican constitution could transform Puerto Rico into a sovereign.

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[11] There is no chance that the *Wheeler* Court somehow forgot about Puerto Rico when making these unqualified statements. *Wheeler* repeatedly cited *Shell* and reaffirmed that the double-jeopardy analysis did not turn on the fact that "Congress had given Puerto Rico 'an autonomy similar to that of the states.'" *Id.* at 319 n.13. Further, *Wheeler* was released less than four weeks after *Califano v. Torres*, 435 U.S. 1 (1978), which upheld a federal statute discriminating against Puerto Rico for federal benefits purposes.

Petitioner also relies on *United States v. Lara*, 541 U.S. 193 (2004), in which the Court held that a tribe is a separate sovereign when prosecuting Indians from other tribes, even though the Court had previously held that tribes lacked this power, only to be overruled by Congress in the so-called "*Duro* fix." *See id.* at 197-98. According to Petitioner, *Lara* shows that Congress can "recognize[] and confirm[] the sovereignty" of any government, such as Puerto Rico. Pet. Br. 33.

Lara provides no support to Petitioner. In *Lara*, the Court concluded that when Congress authorized criminal prosecutions of Indians from other tribes, it had not *delegated* any federal power to the tribes. 541 U.S. at 199. Rather, Congress had merely *relaxed* restrictions on the pre-existing inherent sovereignty of the tribes. *Id.* The Court relied on the text of the *Duro* fix, which stated that Congress's intent was for the "inherent power of Indian tribes ... to exercise criminal jurisdiction over *all* Indians" to be "recognized and affirmed." *Id.* at 198-99 (citing 25 U.S.C. § 1301(2)). The Court further concluded that the Constitution authorized Congress "to lift the restrictions on the tribes' criminal jurisdiction." *Id.* at 200.

But Congress's ability to affirm pre-existing sovereignty does not advance Petitioner's position, because Puerto Rico never possessed any sovereignty in the first place. Thus, Petitioner effectively asks the Court to hold that the 1950-1952 legislation had the *opposite* effect from the *Duro* fix: whereas the *Duro* fix *affirmed* the tribes' pre-existing sovereign power to prosecute Indians from other tribes, Petitioner contends that the 1950-1952 legislation *altered* Puerto

Rico's status by transforming it from non-sovereign into sovereign. Nothing in *Lara* supports Petitioner's argument that Congress did, or even could, take this step in the 1950-1952 enactments.

Petitioner relies on a string-cite in *Lara* that lists "more radical adjustments to the autonomous status of other such dependent entities," including the 1950-1952 Puerto Rican legislation. From this, Petitioner draws the inference that the Court must also view Puerto Rico as sovereign. Pet. Br. 33-34. But this inference does not follow. First, it is undisputed that the 1950-1952 legislation was an adjustment in Puerto Rico's "*autonomy*"—but as Petitioner itself notes, the level of local autonomy is not relevant to the double jeopardy sovereignty analysis. *See* Pet. Br. 26-27. Second, the very same string-cite includes a First Circuit case that "describ[es] various adjustments to Puerto Rican autonomy through congressional legislation since 1898." *Lara*, 541 U.S. at 204 (citing *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 39-41 (1st Cir. 1981)). If Petitioner's interpretation of the Court's string-cite were correct, then each and every one of those adjustments (not just the 1950-1952 legislation) would have altered Puerto Rico's sovereign status, which of course Petitioner does not suggest.

More fundamentally, a long string-cite would be an exceedingly elliptical way for this Court to overrule its repeated prior statements that territories are not sovereign. *See supra* Part I.A. The majority opinion in *Lara* never cited *Grafton*, *Shell*, or *Waller*, and there is

no evidence whatsoever that the Court intended to revisit those cases.

At bottom, Petitioner's argument contains a basic flaw. Petitioner argues that Puerto Rico's superficial similarity to the states (*i.e.*, that it joined the United States after the Founding, and has a territorial constitution) and its superficial similarity to tribes (*i.e.*, that it is subject to Congress's plenary control) can be merged together so that Puerto Rico, too, can be considered a sovereign. But this argument ignores the fact that Puerto Rico lacks the attributes of states and tribes that *make* those entities sovereign: Puerto Rico has no sovereignty recognized by the Constitution (like a state), nor any pre-existing, inherent sovereignty (like a tribe). The analogy to both states and tribes therefore fails: Puerto Rico has no sovereignty apart from that of the United States.

IV. PETITIONER OFFERS NO CLEAR POSITION ON EITHER THE DEFINITION OF SOVEREIGNTY OR THE IMPLICATIONS OF SOVEREIGNTY.

Respondents offer the Court a clear rule. States and Indian tribes are sovereign; territories are not. And Respondents' justification for that rule is equally clear. States are sovereign because the Constitution recognizes them as such; Indian tribes are sovereign because they plainly were sovereign, under any possible definition of that term, prior to the arrival of Europeans, and have retained a portion of that sovereignty; territories are non-sovereign because they lack any of the constitutional protections or attributes of sovereignty.

By contrast, Petitioner is unable to offer a clear rule on either the distinction between sovereign and non-sovereign entities, or the legal consequences of conferring sovereignty. The ambiguities in Petitioner's position—and their troubling implications in future cases—are additional reasons to reject Petitioner's position in this case.

1. Petitioner defines sovereignty abstractly, in terms of where power "emanates." Pet. Br. 28. This is a vague concept, and Petitioner's application of this concept to Puerto Rico does not clarify matters. Petitioner cites at least seven justifications for its position that Puerto Rico is "sovereign": (a) Public Law 600 described the forthcoming relationship with Puerto Rico as "in the nature of a compact," Pet. Br. 29; (b) Puerto Rico's Constitution includes hortatory language such as "we, the people," *id.*; (c) its Constitution provides for three branches of government, *id.* at 30; (d) the federal government exercises a low degree of control over Puerto Rico's internal affairs, *id.*; (e) Congress's changes to Puerto Rico's Constitution were supposedly "minor," *id.* at 31; (f) Congress verified that Puerto Rico would have a "republican form of government," *id.* at 32; (g) the State Department characterized the results of the 1950-1952 legislation to the U.N. in a particular way, *id.* at 37. Petitioner offers no guidance on the relative importance of these factors or on how to determine "sovereignty" when any of them is absent.

Petitioner's inability to provide a clear rule on the definition of "sovereignty" is problematic for three reasons. First, sovereignty is the most basic attribute

of a political entity; it is the sort of concept for which an indeterminate, multi-factor test seems particularly inappropriate.

Second, Petitioner's multiple factors reflect incompatible conceptions of sovereignty. For instance, Petitioner relies both on language in the Puerto Rican Constitution (*e.g.*, "[w]e, the people," P.R. Const. pmbl.), and on language in Congress's enactments (*e.g.*, "in the nature of a compact," Pet. App. 353a). But a theory of sovereignty that depends on the internal intention of the Puerto Rican people, and a theory of sovereignty that depends on the external intention of Congress, are entirely different. Needless to say, internal and external intentions may not always align. For instance, suppose the Puerto Rican Constitution originally included, or was amended to include, prefatory language stating that Puerto Rico operates under authority delegated by Congress. Would this language extinguish Puerto Rico's sovereignty based on the internal views of its people, or would Puerto Rico remain sovereign based on the external intent of Congress? Petitioner offers no coherent theory of sovereignty that would answer this question.

Third, Petitioner's multi-factor test injects ambiguity into the constitutional status of other sub-national units. For example, Congress has enacted legislation authorizing the Virgin Islands "to organize a government pursuant to a constitution of their own adoption." Pub. L. 94-584, 94 Stat. 2899 (1976). In response, the Virgin Islands drafted a proposed constitution, but Congress rejected it, "urg[ing]" the Virgin Islands to convene again "for the purpose of

reconsidering and revising the proposed constitution." Pub. L. 111-194, § 1, 124 Stat. 1309, 1310 (2010). If Congress ultimately does approve the Virgin Islands' constitution, Petitioner's position gives no clear guidance on what factors must exist for the Virgin Islands to be considered sovereign—a troubling ambiguity, given that Petitioner's position has legal implications much more radical than the dual-sovereignty exception to the Double Jeopardy Clause.

Further, given this Court's explicit analogy of territories to municipalities, *Waller*, 397 U.S. at 393, a holding that Puerto Rico is "sovereign" could open the door for states to confer sovereignty on municipalities. Given the great diversity in municipal powers nationwide—and even within the same municipality over time—Petitioner's approach would lead to a flood of litigation over whether, and under what circumstances, a municipality could become sovereign.

2. In addition to Petitioner's inability to present a clear definition of sovereignty, Petitioner is unable to present a clear picture of the consequences of ascribing sovereignty to Puerto Rico.

Petitioner argues that as a result of Puerto Rico's sovereignty, the 1950-1952 legislation is immune from repeal. Pet. Br. 41-42. But Petitioner gives no indication of what this means in practice—a significant omission, because Petitioner's position has potentially dramatic consequences.

If Petitioner's position prevails, the 1950-1952 legislation would be ossified into a kind of sub-constitution, immune from repeal by Congress. (It is

even unclear whether, under Petitioner's view, the 1950-1952 legislation could be repealed through a constitutional amendment.) Thus, any subsequent congressional enactment that "violated" the 1950-1952 legislation could be struck down as inconsistent with that impossible-to-repeal legislation.

Yet Public Law 600 states that the provisions of the Puerto Rico Federal Relations Act "continue in force and effect," Pet. App. 354a; and if those provisions are immune from repeal, their breadth and vagueness could jeopardize a wide array of subsequent legislation. For instance, Section 37 of the Federal Relations Act states that "the legislative authority ... provided [to Puerto Rico] shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate and reorganize the municipalities." JA120. One can easily imagine litigants challenging federal statutes allegedly impinging on the Puerto Rican legislature's authority to enact "locally applicable" legislation as "violating" this provision.[12] Petitioner offers no explanation of whether, or to what extent, such challenges will be permissible.

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[12] To take one prominent example: in the *Franklin* case in which this Court recently granted certiorari, Judge Torruella's concurrence argued that the federal statute at issue, if interpreted to prevent Puerto Rico from enacting local bankruptcy legislation, would be inconsistent with Section 37 of the Federal Relations Act, although—consistent with current law—he did not suggest the statute would be invalid on that ground. *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 352-53 (1st Cir. 2015), *cert. granted*, No. 15-233 (2015).

In addition to arguing that the 1950-1952 legislation is immune from repeal, Petitioner also quotes with approval case law stating that in 1952, "Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress," Pet. Br. 42. This was the position taken by the concurring and dissenting Justices below. Pet. App. 134a-135a, 230a.

Neither Petitioner nor the dissenting opinions elaborate on the consequences of declaring that the United States' plenary powers have been abrogated; suffice it to say that they could be radical. To take but one example, Puerto Ricans are not subject to federal income tax, notwithstanding the Constitution's requirement that taxes be uniform nationwide. U.S. Const., art. I, § 8, cl. 1. The reason Puerto Rico's distinct tax regime complies with the Constitution is that Congress has the plenary authority to "to levy local taxes for local purposes within the territories." *Downes*, 182 U.S. at 292 (White, J., concurring). Of course, if the 1950-1952 legislation withdrew Congress's plenary power over Puerto Rico, this reasoning might no longer be valid. Thus, Petitioner's position could threaten the entire Puerto Rican tax regime. At a minimum, Petitioner's position that Congress's plenary powers over Puerto Rico have been reduced in an unspecified way would inject profound instability into basic aspects of Puerto Rican governance.

The indeterminate and potentially serious consequences of declaring Puerto Rico a "sovereign" counsel in favor of retaining this Court's century-old rule: states are sovereign, and territories are not.

V. THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE WILL NOT CONFER "DIGNITY" ON PUERTO RICANS.

Petitioner's brief concludes with the assertion that Respondents' position "disparage[s] the dignity of the people of Puerto Rico who established the Commonwealth and its Constitution in 1952." Pet. Br. 45. That is incorrect. Respondents' position does not demean the Puerto Rican people, but in fact honors them, by providing an honest assessment of Puerto Rico's political reality.

1. First, authorizing dual prosecutions in Puerto Rico would not enhance the dignity of the Puerto Rican people. The effect of the dual-sovereignty exception to the Double Jeopardy Clause would be to authorize federal indictments of Puerto Rican citizens who commit local crimes even after territorial prosecutions have concluded, based on the federal government's disagreement with the outcome of the territorial proceedings. For instance, the Puerto Rican Constitution prohibits the death penalty. P.R. Const. art. II, § 7. Yet under the dual-sovereignty exception, the federal government may indict a Puerto Rican citizen for capital murder, even if he has already been prosecuted in territorial court for the same murder. Of course, the federal government can do this in the states as well; but unlike citizens of the states, the citizens of Puerto Rico have no political voice whatsoever in either the election of the legislators who enacted the federal death penalty, or the President that seeks to impose it. This outcome hardly enhances Puerto Ricans' dignity.

The dual-sovereignty exception would also, as a matter of federal law, authorize the reverse situation: territorial prosecutions that follow federal prosecutions. But given that the concurring opinion below argued that the dual-sovereignty exception violated the Puerto Rican Constitution, and the Justices in the majority below evidently have strongly held views that the dual-sovereignty exception should not apply in Puerto Rico, such prosecutions might well be held illegal on remand as a matter of territorial law. In any event, even if such prosecutions would be held permissible, they would be rare. As a matter of policy, the Puerto Rican government has signed a Memorandum of Understanding with the federal Department of Justice that yields "primary jurisdiction" over a wide array of serious crimes to federal officials.[13] As this case illustrates, there are cases in which territorial officials seek to prosecute defendants following a federal prosecution; but subjecting a small, seemingly random subset of Puerto Rican criminal defendants to territorial prosecution for crimes for which they have already served time in federal prison is not dignifying to Puerto Ricans.

We also note that the dual-sovereignty exception to the Double Jeopardy Clause is itself highly controversial. This Court authorized the rule in a 5-4 decision over a vigorous dissent, *Bartkus v. Illinois*, 359 U.S. 121, 150-64 (1959) (Black, J., dissenting), and numerous scholars and judges—including the

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[13] This Memorandum is available at http://laevidencia.com/files/MOU_2_feb_2010.pdf.

concurring judges below—have since argued that it is unfair and inconsistent with the original public meaning of the Constitution. Pet. App. 164a-190a; *see also, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 6 (1995). *Bartkus*, of course, is a binding precedent that has repeatedly been applied. But it is far from clear that the Puerto Rican people would regard the expansion of that controversial precedent to the territories—thus making Puerto Rican citizens vulnerable to dual prosecutions—as a show of respect.

2. As for Petitioner's suggestion that denying Puerto Ricans' "sovereignty" disparages their dignity: this is a surprising accusation to level at the Supreme Court of Puerto Rico, whose opinion in this case was an exhaustive, scholarly examination of Puerto Rico's political status that showed no disrespect toward the Puerto Rican people.[14] It is an equally surprising allegation to level at Judge Torruella, perhaps the staunchest defender in the federal judiciary of the rights of Puerto Ricans,[15] who similarly has argued that

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[14] The decision below was certainly better-reasoned than the decision it overruled: *Pueblo v. Castro García*, 120 P.R. Dec. 740 (P.R. 1988). In *García*, the court held that the dual sovereignty exception did not apply because Puerto Rico's power to prosecute emanated *both* from Congress *and* from "the People"—a theory Petitioner does not defend. Pet. App. 31a-32a (quoting *García*, 120 P.R. Dec. at 779-81).

[15] *See, e.g.*, *Igartúa v. United States*, 626 F.3d 592, 612–39 (1st Cir. 2010) (Torruella, J., dissenting in relevant part); *Igartúa De La Rosa v. United* States, 417 F.3d 145, 158–84 (1st Cir. 2005) (Torruella, J., dissenting); Juan R. Torruella, *The Insular Cases:*

Puerto Rico is not "sovereign" for double jeopardy purposes. *See United States v. Lopez Andino*, 831 F.2d 1164, 1172–77 (1st Cir. 1987) (Torruella, J., concurring).

These distinguished jurists have argued that Puerto Rico is non-sovereign not out of disrespect for Puerto Ricans' dignity, but out of respect. Dignity requires honesty. And an honest assessment of Puerto Rico's current political status requires a recognition that Puerto Rico is not sovereign. Puerto Ricans indisputably enjoy significant autonomy, but the fact remains that they are subject to the total authority of Congress; are treated differently under federal law relative to Americans living in the states; and are disenfranchised in federal elections. *Supra* at 19-21. Declaring Puerto Rico to be sovereign for purposes of the dual-sovereignty exception to the Double Jeopardy Clause will not alter these realities. To the contrary, it would convey a deeply unappealing message to Puerto Ricans: Puerto Rico may be considered "sovereign," but only in the context where it helps the Puerto Rican people the least, and in fact strips them of a constitutional right against dual prosecutions to which they otherwise would be entitled.

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As Petitioner correctly states, Pet. Br. 45, there is a lively debate in Puerto Rico today about Puerto Rico's future political status. This debate reflects dissatisfaction among many Puerto Ricans about Puerto Rico's current political situation. Reasonable

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The Establishment of A Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 286 (2007).

minds disagree about what Puerto Rico's future status should be, and Respondents take no position on that issue.

But any honest debate over Puerto Rico's future necessarily begins with an honest assessment of Puerto Rico's present. Puerto Rico, at present a territory, is not sovereign.

CONCLUSION

The judgment of the Puerto Rico Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Proposed Puerto Rican Constitution, Section 20:

The Commonwealth also recognizes the existence of the following human rights:

The right of every person to receive free elementary and secondary education.

The right of every person to obtain work.

The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.

The right of every person to social protection in the event of unemployment, sickness, old age or disability.

The right of motherhood and childhood to special care and assistance.

The rights set forth in this section are closely connected with the progressive development of the economy of the Commonwealth and require, for their full effectiveness, sufficient resources and an agricultural and industrial development not yet attained by the Puerto Rican community.

In the light of their duty to achieve the full liberty of the citizen, the people and the government of Puerto Rico shall do everything in their power to promote the greatest possible expansion of the system of production, to assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation. The executive and judicial branches shall bear in mind this duty and shall construe the laws that tend to fulfill it in the most favorable manner possible.